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Ex Parte Presentation

Marlene H. Dortch, Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W., TW-A325
Washington, DC 20554

**Re: CC Docket No. 96-128, Illinois Public Telecommunications Association,
Petition for Declaratory Ruling**

Dear Ms. Dortch:

On behalf of the American Public Communications Council ("APCC"), we are submitting this *ex parte* letter for inclusion in the record of this proceeding.

APCC's recent *ex parte* submissions have discussed the two independent legal bases for the relief requested by the petitioners in these proceedings. In our *ex parte* submission of September 12, 2006,¹ we showed that the Common Carrier Bureau's 1997 *Waiver Order*,² which temporarily waived the April 15, 1997, deadline for the Bell Companies to bring their payphone line rates into compliance with the new services test ("NST"), unequivocally required the Bell Companies to refund any excess over NST-compliant rates for the period from April 15, 1997, until the date that NST-compliant rates became effective. In our *ex parte* submission of October 25, 2006,³ we showed that, regardless of the *Waiver Order*, the Commission must still find that PSPs are entitled to reparations, in the form of refunds, for non-NST-compliant rates because reparations are the legally required (and only effective) remedy for the Bell Companies' years of noncompliance with the NST and with Section 276 of the Communications Act (the "Act"). 47 U.S.C. §§ 276(a), (b)(1)(C).

In this *ex parte* letter, we explain that the same policy considerations underlying APCC's argument that the Act itself requires refunds (discussed in the *Section 276 Ex Parte*) also

¹ APCC *Ex Parte*, "The *Waiver Order* Requires Refunds from the Date NST-Compliant Tariffs Became Effective Back to April 15, 1997" (filed September 12, 2006) ("*Waiver Order Ex Parte*").

² *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, 12 FCC Rcd 21370 (CCB 1997) ("*Waiver Order*").

³ APCC *Ex Parte*, "Section 276 of the Act Requires Refunds of Payphone Line Charges in Excess of NST-Compliant Rates" (filed October 25, 2006) ("*Section 276 Ex Parte*").

Marlene H. Dortch, Secretary
 October 26, 2006
 Page 2

reinforce APCC's position that the *Waiver Order* requires refunds (discussed in the *Waiver Order Ex Parte*). In its opinion referring interpretation of the *Waiver Order* to the FCC,⁴ the Ninth Circuit court of appeals suggested that the *Waiver Order* is susceptible to more than one interpretation regarding whether its refund requirement applies to the period between May 19, 1997, and the dates that NST-compliant payphone line rates ultimately became effective. Noting that "any initial expectation [on the Commission's part] of prompt filing of NST-compliant tariffs may not have been fulfilled,"⁵ the court stated:

interpreting the *Waiver Order* requires consideration of policy considerations similar to those that gave rise to the FCC's 1996 and 1997 orders applying the new services test to intrastate payphone rates, as well as to the *Waiver Order* itself.

Id. While APCC believes that the PSPs' interpretation of the *Waiver Order* is compelled by the language and context of the order, we recognize that the Commission may agree with the Ninth Circuit that the *Waiver Order* is ambiguous.⁶ In that event, the relevant policy considerations, as well as the relevant legal requirements, clearly must be taken into account.

The relevant policy considerations overwhelmingly support the PSPs' position. In choosing the correct interpretation of the *Waiver Order*'s refund requirement, there are at least three issues the Commission must address. The first issue is to determine what the Commission intended and expected would happen after it issued the *Waiver Order*. As the *Waiver Order* itself makes clear, the Commission intended (1) to provide a "limited duration" waiver, not an indefinite-duration one (*Waiver Order* ¶ 21), (2) to bring the LECs into compliance with the requirements of the *Payphone Orders*⁷ as quickly as possible,⁸ and (3) to ensure that PSPs were not injured by the delay in compliance.⁹ Moreover, the Commission clearly expected that, even

⁴ *Davel v. Qwest Corp.*, 2006 U.S. App. LEXIS 21098 (9th Cir. 2006) ("*Davel*").

⁵ *Davel* at *31. In fact, in the cases before the Commission, it is crystal clear that the Commission's expectation *was not* fulfilled.

⁶ At a minimum, the language of the *Waiver Order* does not preclude the interpretation proposed by the PSPs. See *Waiver Order Ex Parte*.

⁷ *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-128, Report and Order, 11 FCC Rcd 20541 (1996) ("*First Payphone Order*"), recon. 11 FCC Rcd 21233 (1996) ("*First Payphone Reconsideration Order*"), *aff'd in relevant part*, *Ill. Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997), *cert denied*, *Virginia State Corp. Comm'n v. FCC*, 523 U.S. 1046 (1998) (collectively "*Payphone Orders*")

⁸ *Waiver Order* ¶ 19 ("in the interests of bringing LECs into compliance with the [*Payphone Orders*], we waive [the NST requirement] for 45 days . . .").

⁹ *Id.* ¶ 20 ("This [refund requirement] will help to mitigate any delay in having in effect intrastate tariffs that comply with the guidelines . . .").

Marlene H. Dortch, Secretary
October 26, 2006
Page 3

though the compliance filing deadline had to slip by four months,¹⁰ compliance could be quickly achieved because (1) the Bell Companies would file their payphone line tariffs for NST review by May 19, 1997, (2) those filings would demonstrate substantial if not total compliance with the NST,¹¹ (3) the state public service commissions would be able to evaluate the Bell Companies' NST compliance,¹² and (4) that state commissions would be able to complete their review and to require any necessary rate revisions "within a reasonable period of time."¹³

The second issue that must be addressed is whether the Commission's intentions and expectations were actually fulfilled. It is clear that they were not. First, one of the Bell Companies (Qwest) did not even make the required compliance filings in the vast majority of its states. Second, in the vast majority of states, the Bell Companies did *not* comply with the NST. Third, many state public service commissions required additional guidance in order to complete their NST review. Fourth, due to the Bell Companies' resistance and the uncertainty of some states as to the NST standard, most states could not complete their review and ensure NST compliance "within a reasonable period of time." As a result, the intended "limited duration" waiver became effectively a five-to-nine year waiver.

The final issue to be addressed concerns how the Commission should interpret and apply the *Waiver Order* in light of these failed expectations. As discussed in the other two *ex partes*, among the relevant policy considerations are that: (1) Congress required the Commission to end Bell Company payphone discrimination no later than the effective date of the Section 276(b) rules (April 15, 1997); (2) it is the Commission's responsibility to ensure compliance with

¹⁰ The original filing deadline was January 15, 1997. *First Payphone Reconsideration Order* at 21308 ¶ 163. The *Waiver Order* extended this deadline to May 19, 1997. The *Davel* order somewhat confusingly states that "[t]hese [payphone line] rates were due to become effective on April 15, 1997, but the Coalition wanted that deadline extended forty-five days from April 4, 1997." *Davel* at *8. In fact, what was extended to May 19, 1997, was the filing deadline, not the effective date, and the original filing deadline was January 15, 1997, not April 4 or April 15. NST-compliant rates would not become effective until the state commissions completed their review processes, and the refund requirement was intended to ensure that, whenever that process was completed, the rates would be retroactively effective as of April 15, 1997. *Waiver Order* ¶¶ 19, 20.

¹¹ *Id.* ¶ 19 (Bell Companies are required to "file tariffs that are consistent with the new services test").

¹² *Id.* ¶ 23 ("the states' review of the intrastate tariffs that are the subject of this limited waiver will enable them to determine whether these tariffs have been filed in accordance with the Commission's rules, including the "new services" test").

¹³ *Id.* ¶ 19 n. 60. Whether the Commission expected it would take more or less time than the original three months allowed for state commission review, it is plain that the Commission did not expect it to take five to nine *years* for the BOCs to have NST-compliant rates in effect.

Marlene H. Dortch, Secretary
October 26, 2006
Page 4

Section 276;¹⁴ (3) after years of non-compliance by the Bell Companies, the only way to ensure timely compliance with the Act is to require compliance retroactively, by requiring refunds; and (4) withholding refunds would not only leave the PSPs to bear the losses from the Bell Companies' non-compliance, but would reward the Bell Companies for their persistent noncompliance.¹⁵

For all these policy reasons, the Commission should address the "current dilemma [which was] not contemplated at the outset by the agency" (*Davel* at *31), by interpreting the Waiver Order to require refunds of all payphone line charges in excess of NST-compliant levels, from April 15, 1997, until the effective date of NST-compliant rates.

Sincerely,



Albert H. Kramer
Robert F. Aldrich

cc: Daniel Gonzalez
Michelle Carey
Scott Deutchman
Scott Bergmann
Christopher Killion
Diane Griffin
Thomas Navin
Donald Stockdale
Tamara Preiss
Paula Silberthau
Albert Lewis
Pamela Arluk
Lynne Engledow

¹⁴ If the *Waiver Order* left the states free to allow the Bell Companies to maintain non-NST-compliant rates for five to nine years and then to deny refunds for those years of non-compliance, there would be no escaping the conclusion that the entire NST review process is an unauthorized subdelegation of the Commission's 276 responsibilities. See APCC's Section 276 Ex Parte at 9-13, citing *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir.), cert. denied. sub nom. *Nat'l Ass'n of Regulatory Utility Comm'rs v. United States Telecom Ass'n*, 543 U.S. 925 (2004). By contrast, if the *Waiver Order* required refunds for all charges in excess of NST-compliant rates, as the PSPs contend, then it constitutes an effective check on the states NST review processes, precluding any finding of unlawful subdelegation.

¹⁵ See *Davel* at *32 (policy considerations include "whether a narrow construction of the Waiver Order would reward intentional non-compliance with FCC orders under the 1996 Act").